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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 604

SKIBS, A/S MARIE BAKKE,
Petitioner,

versus

OTIS McALLISTER & CO., a Corporation,
Respondent.

MOTION UNDER RULE 42(1) FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

AND

BRIEF OF AMICI CURIAE IN SUPPORT OF WRIT OF CERTIORARI

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Now come Lykes Bros. Steamship Co., Inc., Mississippi Shipping Company, Inc. and Gulf & South American Steamship Co., Inc., and respectfully move the Court for leave, under Rule 42(1), to file the attached brief as *amici curiae* in support of the petition for *certiorari* heretofore filed in these proceedings. Petitioner has consented to the filing of this brief, but respondent has refused to consent.

Movers are three of the principal steamship companies operating in foreign commerce out of United States Gulf ports. Lykes Bros. Steamship Co., Inc. operates a fleet of more than fifty vessels in regular liner service from United States Gulf ports to the United Kingdom and northern Europe, to the Mediterranean, to Africa, to the Far East and to the Caribbean. Mississippi Shipping Company, Inc. operates regular service out of the Gulf

to the east coast of South America and to Africa, having a fleet of fourteen vessels. Gulf & South American Steamship Co., Inc. operates a fleet of five vessels from the Gulf to the west coast of South America.

For many years, each of the movers has had in its regular ocean bill of lading a clause similar to or identical with the clause which the Court of Appeals for the Ninth Circuit has voided in the instant case. In the case of Lykes Bros. Steamship Co., Inc. and Mississippi Shipping Company, Inc., the clause in question long antedates the Carriage of Goods by Sea Act (1936), and in the case of Gulf & South American Steamship Co., Inc., the use of the clause in its bill of lading is coexistent with the life of the company, that is, over eleven years.

The question presented in this petition for the writ is one of prime importance to movers, invalidating, as it does, a clause long in use, and one which is reasonable, sound and in no way violative of any statute or of any public policy. The question is of great importance, not only to the movers, but also to the maritime industry generally, in that all or virtually all common carriers by sea use similar or identical provisions and have used them for years long antedating the passage of the Carriage of Goods by Sea Act (1936), in which act the opinion of the Court of Appeals in the instant case purports to find authority for invalidating them. The provision was inserted and used in the carefully prepared form of bill of lading worked out by the War Shipping Administration (WARSHIPLADING, 1942) in the carriage of goods aboard merchant vessels operated by or for the United States government; and later by the National Shipping Authority. The decision of the Court of Appeals

in the instant case thus very seriously affects the rights of movers and of the entire industry; and, if permitted to stand, will have an important and adverse effect on the adjustment of claims in ocean commerce.

Movers request the Court to be permitted to file the attached brief in order to emphasize the importance of the question, not only for themselves, but for the industry, and also to give them an opportunity to indicate to the Court additional reasons why movers believe that the writ should be granted. Therefore, it is respectfully submitted that movers should be permitted to file the annexed brief as *amici curiae* in support of the petition for a writ of *certiorari*.

Respectfully submitted,

Jos. M. Rault

Benjamin W. Yancey
Counsel for Lykes Bros.
Steamship Co., Inc., Mississippi
Shipping Company, Inc. and
Gulf & South American
Steamship Co., Inc.

New Orleans, Louisiana,
February 5, 1959.

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MARTINEZ & YANCEY,
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QUESTION PRESENTED

Was the universally recognized "C.I.F. valuation clause" (that is, the clause by which a cargo owner's damages are stipulated to be assessed on the basis of cost, insurance and freight) invalidated by any provision of the Carriage of Goods by Sea Act (1936), 46 U.S.C. 1300, *et seq.*?

THE FACTS

Respondent, the importer of cargo aboard petitioner's vessel to San Francisco from Callao, Peru, sued the carrying vessel for damage sustained by the cargo on the voyage.

There was no dispute about liability, but the only problem was the assessment of damages. The District Court, on the basis of the "C.I.F. valuation clause," awarded an amount predicated upon the actual damage which the respondent had sustained, that is, the cost of the merchandise plus the cost of transportation (freight, insurance and duties). On appeal, the Court of Appeals reversed, holding, without any sound basis, that the clause somehow "lessened" the carrier's liability for negligence and was therefore void under section 3 (8) of the Carriage of Goods by Sea Act.

ARGUMENT

As has already been pointed out hereinabove, the question is one of very genuine importance to movers, and in their judgment, to the entire shipping industry. The movers' principal purpose in desiring to be given permission to appear, is, as has been stated, to give them the opportunity to bring to the Court's attention the importance of the problem not merely for the litigants at bar, but also for the movers and for the industry as a whole. Accordingly, we shall not enter into any extensive argument on the merits, because it is not desired to burden the Court with what might be thought to be cumulation or duplication. We concur generally in the statements already made by petitioner and by the other *amici curiae*, and we submit that the decision of the District Court was correct and that of the Court of Appeals wrong.

With the Court's permission, however, there is one point which we desire to stress. In *The Ferncliff*, 22 F. Supp. 728, Judge Chesnut, of the District of Maryland, one of the

eminent admiralty judges of the century, made the comment, at pages 742 and 743:

> "' . . . The particular question is not likely to again arise as the subject is now regulated by the Carriage of Goods by Sea Act, § 4(5), 46 U.S.C.A. § 1304(5)."

This comment was quoted in the Supreme Court's affirmance and in its general approval of Judge Chesnut's language, 306 U.S. 450. The opinion of the Court of Appeals in the present case (Petition, app., p. 22) seems to treat this remark of Judge Chesnut's, approved by the Supreme Court, as indicating that the Carriage of Goods by Sea Act sets the question at rest adversely to the validity of the clause. We submit that there is no warrant whatsoever for such a conclusion; and, on the contrary, that precisely the opposite conclusion is the only correct one. The section of the act to which Judge Chesnut referred was *not* 3(8), *i.e.*, was *not* the section which, like the Harter Act before it, prohibits the lessening of the carrier's obligations. The section to which he specifically referred was 4(5), the section which, among other things, prevents the carrier from being liable for more than the "damages actually sustained." The act, section 4(5), 46 U.S.C., section 1304(5), the section to which Judge Chesnut referred as probably setting the question at rest, provides, in these words:

> " . . . In no event shall the carrier be liable for more than the amount of damage actually sustained."

Both Judge Chesnut and the Supreme Court, in *The Ferncliff*, correctly held that that was precisely what the invoice valuation clause did, *i. e.*, prevented the carrier from being liable for more than the actual damages sustained. Judge Chesnut said, 22 F. Supp. at page 742 (again quoted with approval by the Supreme Court, 306 U.S. at page 449):

> " . . . In operation the clause only eliminates prospective profit, and limits the damage to the owner's actual loss in the transaction . . . "

The act specifically provides that the carrier shall not be liable for more than "the amount of damage actually sustained," and the clause in question, as interpreted and approved in *The Ferncliff*, has precisely that effect, permitting the cargo owner to recover no more than his "actual loss in the transaction."

It must not be overlooked that the clause in fact operates to make the cargo owner entirely whole and under the act he is not entitled to more. It computes his damages on the basis of what he actually paid for the goods plus all the cost of carrying them to destination; that represents his "actual loss," the "amount of damages actually sustained," and represents a reasonable, sound, fair, and what is most important, an entirely legal measure of his damages.

One further comment, and we shall close. Sections 1 and 2 of the Harter Act, 46 U.S.C., Sections 190, 191, under which *The Ferncliff* was decided, provide that it shall not

be lawful for any carrier to insert in any bill of lading any clause whereby the carrier is "relieved" from liability for damage arising from negligence, fault or failure in proper loading, stowage, custody, care, or proper delivery of cargo; or any clause whereby the obligations of the carrier to exercise due diligence to make the vessel seaworthy or carefully to handle, stow, care for and deliver the cargo is in any wise "lessened, weakened, or avoided." *The Ferncliff*, decided under these provisions, held that the clause in question did not violate them. They had meanwhile found their way into section 3 of the Carriage of Goods by Sea Act, 46 U.S.C., section 1303, and particularly into paragraph 8 of that section, with no significant change of language. Absolutely nothing in section 3(8) can possibly justify a holding that a valuation clause, valid under sections 1 and 2 of the Harter Act, is invalid under section 3 (8) of the Carriage of Goods by Sea Act. The clause, valid under the Harter Act, is equally valid under the virtually identical language of the Carriage of Goods by Sea Act.

CONCLUSION

It is submitted that the question involved in the case at bar is one of very real importance to the industry, and that the decision of the Court of Appeals was wrong. Accordingly, it is submitted that the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

Jos. M. Rault

Benjamin W. Yancey

Counsel for Lykes Bros. Steamship Co., Inc., Mississippi Shipping Company, Inc. and Gulf & South American Steamship Co., Inc.

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